



# Generally Speaking

## COMINGS and GOINGS

Best wishes to Labor and State Affairs  
**Section Chief Jan DeYoung** who retired this  
month.

**Chris Curran, LOA I**, has re-joined the  
Labor and State Affairs Section, but in the  
Juneau offices this time. Welcome back  
Chris!

## IN THIS ISSUE

Comings and Goings .....	1
Kudos .....	1
Civil Division.....	2
Child Protection .....	2
Commercial and Fair Business .....	2
Human Services.....	4
Labor and State Affairs .....	5
Legislation and Regulations.....	7
Natural Resources .....	8
Oil, Gas and Mining.....	9
Opinions, Appeals and Ethics .....	10
Regulatory Affairs and Public Advocacy (RAPA) .....	13
Torts and Workers' Compensation.....	15
Criminal Division.....	16
Anchorage DAO.....	16
Fairbanks DAO .....	16
Kodiak DAO.....	18
Palmer DAO .....	18
Office of Special Prosecutions and Appeals (OSPA) .....	20
Save the Date.....	22

*Please welcome the following summer interns:*

**Shawn Crowley** – Anchorage Environmental  
Section. Shawn attends Columbia University  
School of Law.

**Anne Edwards** – Juneau Oil, Gas and Mining  
and Commercial and Fair Business Sections. Anne  
is attending the University of Iowa, College of  
Law.

**John McNulty** – Anchorage Oil, Gas and Mining  
Section. John is attending the University of  
Virginia School of Law.

**Patrick Sherry** – Anchorage Torts and Workers'  
Compensation Section. Patrick attends the  
University of Colorado Law School at Boulder and  
will commence his third year this Fall.

**Harvey Templeton** – Fairbanks Transportation  
Section. Harvey is attending the Texas Tech  
Law School.

**Nichole Sperbeck** – Anchorage Office Of Special  
Prosecutions and Appeals. Nichole is a second  
year law student at Gonzaga University.

**Danielle Bailey** – Anchorage DAO. Danielle  
attends the University of Minnesota Law School

**James Knowles** – Anchorage DAO. James  
attends the University of Michigan Law School.

## KUDOS

Congratulations to **AAG Laura Derry** who passed  
the Alaska Bar. She was sworn in on May 21.

## CIVIL DIVISION

### Child Protection

**New CINA cases** based upon allegations in the Office of Children's Services (OCS) petitions:

OCS assumed emergency custody of a medically fragile infant who was born premature. The mother indicated to hospital and OCS staff that she did not want the child. Attempts to have relatives assume care of the infant were unsuccessful. The father's whereabouts are unknown.

OCS assumed emergency custody of a teenager after she disclosed sexual abuse in the home at the hands of her guardians. The male guardian admitted the sexual abuse and is currently incarcerated. Although aware of the abuse, the female guardian indicated she felt it was the minor's fault and does not want her back in the home. The biological mother is unable to care for the teenager due to substance abuse issues and the biological father is deceased.

OCS received reports of harm that indicated the parents of a medically fragile baby were abusing substances and engaging in domestic violence. After investigation, OCS determined that there was a long history of domestic violence and substance abuse and that the baby's needs were not being met. OCS made efforts to have the extended family provide care for the child, but no one was available. OCS assumed emergency custody.

OCS assumed emergency custody of a 9-year-old girl after she was abandoned by her mother at a local hotel. When the mother was contacted by phone, she seemed intoxicated and did not make arrangements to pick up her child. Her whereabouts are currently unknown. The named father denied he is the father and will not take placement.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

### Commercial and Fair Business

#### **State Joins Michelin Multistate Settlement**

Alaska, along with 16 other states, entered into a settlement with Michelin North America, Inc. regarding alleged representations Michelin made in its advertising of Michelin fuel efficient tires. The states allege that Michelin's fuel efficiency advertisements didn't adequately disclose certain information about its fuel efficiency claims and made claims that Michelin makes the most fuel efficient line of tires on the road when in some classes of tires, a Michelin tire is not the most fuel efficient.

The settlement requires Michelin to possess competent and reliable scientific evidence substantiating any fuel efficiency claim regarding its tires, make other business practice improvements, and to pay the states \$375,000. AAG Julia Coster is representing the state in this matter.

#### **State Sues Kia America Over Warranty Issues**

The state filed a lawsuit against Kia America on May 7 for violations of Alaska's Unfair Trade Practice and Consumer Protection Act. The suit alleges Kia made misrepresentations to consumers about warranty coverage in areas where there are no authorized Kia dealers. The issue was brought to the attorney general's attention when a consumer in Ketchikan filed a consumer complaint alleging that Kia told him it would honor warranty repairs performed by any qualified mechanic in Ketchikan, even if the repair was not done by an authorized Kia dealer.

Based on these representations, the consumer purchased a new Kia from a dealer in Seattle.

When the consumer had a warranty repair completed by the local Subaru dealer, Kia refused to honor the warranty. The state's suit seeks restitution for the consumer, injunctive relief, and a \$50,000 civil penalty. AAG Ed Sniffen is the lead attorney.

#### **State Moves to Dismiss Lawsuit Seeking to Force Attorney General to File Suit**

In a lawsuit filed against the state last month, plaintiff seeks to compel the attorney general to file a lawsuit on the consumer's behalf. The *pro se* plaintiff, Dan Dudley, alleges that Proctor and Gamble (P&G) manufactured a defective tooth brush called the Crest Spin Brush Pro.

Over the last several years, Mr. Dudley has complained to the attorney general, the Department of Health and Human Services, and the Governor's office about his concern with this product, and how it can damage gum tissue. After reviewing the complaint, the state found no health or safety issues with the product, and did not identify any violations of state law. The state told Mr. Dudley it would not be pursuing the matter further.

Not satisfied with this response, Mr. Dudley filed a lawsuit in superior court to compel the state to bring litigation on behalf of himself and others against P&G. The state filed a motion to dismiss the complaint, citing to a line of Alaska cases that recognize the attorney general's absolute discretion over when and whether to pursue litigation on behalf of the state. AAG Ed Sniffen is the lead attorney on the case.

#### **Alaska Supreme Court Affirms AELS Board Decision**

In April, the Alaska Supreme Court affirmed the Architects, Engineers, and Land Surveyor's (AELS) Board's denial of John Squires' application for an engineer's registration. Former AAG Jenna Conley represented the board in the case. The board denied the application because Mr. Squires failed to take one of the two

examinations that applicants must pass in order to obtain a registration. The board provides for a waiver of the examination requirement for applicants able to document at least 240 hours of professional experience. Mr. Squire requested a waiver but was denied it because he failed to provide satisfactory proof he had the required hours of professional experience.

On appeal, Mr. Squires unsuccessfully challenged the board's factual finding that he had failed to present enough verifiable evidence of the engineering experience required for an exam waiver. The Court also rejected his arguments that the board erroneously imposed experience verification requirements that were not set out in any statute or regulation in violation of the Administrative Procedure Act; that the agency denied him due process by imposing experience verification requirements that could not be met and by disregarding evidence that he was sufficiently qualified to be a registered engineer; and that the agency denied him equal protection of the law by not treating him like certain other applicants with the "same background, training, and experience."

#### **Alaska Supreme Court Reverses RCA Decision and Remands**

The Alaska Supreme Court issued its opinion in the appeal of *Municipality of Anchorage, d/b/a Anchorage Water & Wastewater Utility v. Regulatory Commission of Alaska and the Attorney General for the State of Alaska*, reversing the commission's decision and remanding the case to the commission for further proceedings.

At issue before the commission was the amount, if any, that the Anchorage Water and Sewer utilities may collect in rates charged for public utility service for payments in lieu of property taxes imposed on utility assets paid for with grant money ("contributed plant"). The payments in lieu of taxes are known as Municipal Utilities Service Assessments (MUSA). The amount at issue in the case originally presented to the Regulatory Commission of Alaska (RCA) was

approximately \$6 million on an annualized basis. Given the several years that have transpired between the dates of the commission's ruling and the Supreme Court's Opinion, the Municipality's existing refund exposure is somewhat in excess of \$40 million. (The Municipality has been collecting in full, but subject to refund, the rates it contends it is entitled to under a stay pending appeal entered by the superior court in the autumn of 2007.)

The commission based its ruling disallowing MUSA payments on contributed plant on three theories. First, the RCA concluded that its decision was controlled by 1989 precedents issued by its predecessor agency the Alaska Public Utilities Commission. Second, the RCA rejected "tax equity" arguments advanced by the Municipality to the effect that private utilities pay property taxes in their contributed plant (and collect those tax payments in their rates), so the Municipality's utilities should be entitled to similar treatment. Third, the RCA concluded that the MUSA payments have the characteristics of a dividend which may not properly be funded by an increase in utility rates.

The Court rejected all three of the commission's rationales, but did leave open the possibility that the commission might still reach the same result on remand provided that it does so based on well-supported factual findings and legal analysis.

More specifically, the Court determined that (1) the RCA erroneously concluded that its decision was controlled by the 1989 APUC precedents, inasmuch as the APUC had an even earlier precedent specifically allowing MUSA payments on contributed plant to be collected in AWWU's rates; (2) the RCA failed to address factual evidence presented by the Municipality on whether private utilities pay property taxes on contributed plant or whether an increased MUSA payment would result in more equity between private utilities and AWWU; and (3) the RCA erroneously concluded without sufficient factual findings that the proposed incremental MUSA payments had the characteristics of a dividend.

## Human Services

### **Litigation Update**

Two new complaints came in this month:

***Lakeview NeuroRehab v. Palin, et al.*** The plaintiffs are seeking damages (1.6 million dollars) for the alleged failure to pay for special education services for Alaska Children who were placed in an out of state facility. AAG Neil Slotnick and Section Chief Kraly are handling the case for their respective client agencies. They filed a motion to dismiss based on 11<sup>th</sup> Amendment immunity and lack of standing.

### ***Alaska State Medical Association v. State.***

In this case, the state Medical Association is alleging that the Department of Health and Social Services violated the Administrative Procedures Act when adopting emergency regulations related to reimbursement rates for physician services. This case is being handled by AAG Kelly Henriksen.

AAG Rebecca Polizzotto filed a cross motion for summary judgment in the Estelle Carmichael case. In this case, Alaska Legal Services brought suit alleging that Ms. Carmichael was denied due process when she was denied employment with a personal care agency due to an extensive criminal history. The theory behind the case is that she is entitled to due process before the state can deny her ability to be a personal care attendant. The state's position is essentially that her convictions afforded her ample due process and that she is estopped from re-litigating those issues in this case.

### **Licensing**

AAG Polizzotto continues to work towards finding a resolution of the Mary Conrad Center matter. The state assumed operations of the center in December of last year.

## **Medicaid Recovery**

The third-party liability/subrogation team opened 24 cases and closed 18 cases. They have an open case load of 987 at this time. During May, 10 cases were resolved for a total of \$65,064.42; year-to-date recovery totals \$277,709.18.

AAG Scott Friend completed the operational set up for the estate recovery work that the section took over last summer. This took longer than expected due to changes in personnel and the fact that the system that was inherited was not in good shape. Now as cases are entered into a new database, the tracking of potential and actual recovery will be seamless and efficient. In addition, the state will be able to provide very accurate reporting to the federal government to show the recovery process. The improvements and the efforts that went into them were well worth it. A backlog of cases remain that need to be evaluated, but over the past two months, AAG Friend has opened 175 cases, closed 22 (no legal basis for recovery) and settled one case for \$112,741.91.

AAG Friend is also working with the agency on the new cycle of Medicaid provider audits.

## **Other**

AAG Libby Bakalar has been monitoring H1N1 (swine flu) status with the Department of Health and Social Services.

AAG Rebecca Fowler has been working on a number of public records requests related to a private dispute action between two personal care provider agencies.

AAG Kimberly Allen gave a presentation on the personal care program to a national group of state attorney generals that work with Medicaid program.

AAG Nevhiz Calik has been working on "transition" conservatorships and guardianships. The section has agreed to file the necessary

petitions for children who are aging out of state custody and need conservators or guardians.

AAG Kelly Henriksen is in the agency review stage of the Omnibus Medicaid regulations (600-plus pages). This project is part two of a two-part project to retool the state's Medicaid Regulations. She has also been working on a number of Health Insurance Portability and Accountability Act (HIPAA) related issues.

## **Labor and State Affairs**

### **Alaska Energy Authority**

AAG Mike Mitchell worked with the Alaska Energy Authority (AEA) on various energy-related matters this month, including the preparation of regulations for grants for renewable energy projects under AS 42.45.045, meeting with AEA and the Renewable Energy Fund Advisory Committee and incorporating their comments into the initial draft regulations.

### **Department of Military and Veteran Affairs**

AAG Mike Mitchell assisted the Department of Military and Veterans Affairs in preparing the state disaster declaration and request for a federal disaster declaration due to the recent flooding on the Yukon River.

### **Elections**

On May 27, AAG Sarah Felix traveled to Bethel to attend the Yup'ik language outreach program presented by the division of elections to representatives of the 28 communities in the Bethel Census Area. The program was well attended and a great success. On the *Nick* case (ongoing litigation concerning the adequacy of Yup'ik language assistance provided by the division of elections), the Federal District Court has scheduled oral argument on the plaintiffs' motion for further injunctive relief for June 26, in Anchorage District Court. The plaintiffs have moved the court to require federal election

observers, and other additional measures, claiming that further relief is needed because the division (allegedly) did not comply with the preliminary injunction issued in July 2008 for the elections held last year. The division opposes additional relief, and has requested that the court set an evidentiary hearing for the division to present evidence showing that it is in compliance with the preliminary injunction and with the Voting Rights Act requirements for minority language assistance.

The Department of Law issued opinions recommending to the Lieutenant Governor that two initiative applications be approved. The first one, 09RPEA, seeks to increase the municipal residential property tax exemption in AS 29.45.050(a) from \$20,000 to \$50,000. The second one, 09OPUP, seeks to prohibit a public official from enriching him or herself, or a relative, close friend, business associate, employer or contributor. AAG Mike Barnhill prepared the opinions for these initiatives.

#### **Department of Administration**

##### ***Premera Blue Cross v. Dept. of Administration.***

This is a protest of the award of the state's third-party administrator contract for health care benefits plan to Wells Fargo Insurance Services of Alaska. The commissioner denied the protest appeal on May 15 and upheld the procurement officer's decision to award the contract to Wells Fargo. Premera has filed a motion for reconsideration with the commissioner. The Division of Administrative Services has until June 12<sup>th</sup> to file a response. Earlier, Premera had filed a complaint for a preliminary injunction in superior court, but after receiving the commissioner's decision, withdrew that complaint on May 22<sup>nd</sup>. AAG Rachel Witty represents the Department of Administration's procurement officer in this matter.

#### **Office of Rate Review**

This month the section assisted the Office of Rate Review (ORR) in settling two

administrative appeals of Medicaid-waiver rates for home and community (HCB) providers in April. The final order of dismissal has been received in *ITMO Job Ready, Inc. dba Ready Care* and the section is awaiting the final commissioner's order of dismissal in *ITMO Frontier Community Services*. *ITMO Job Ready* had been set for a 4-day administrative hearing in late April. The ORR took over rate-setting for HCB providers from the Division of Senior and Disability Services (DSDS) in August 2008. These two matters were the first formal administrative rate appeals filed by HCB providers. AAG Linda Kesterson handled these matters.

#### **Employment Cases/EEOC (Equal Employment Opportunity Commission)**

***State v. PSEA, S-13414.*** On May 15, the section filed the state's appellate brief with the Alaska Supreme Court in this case in which the state argues that a labor arbitrator's award reinstating a law enforcement officer found to have engaged in egregious misconduct was gross error and should be vacated. AAG Bill Milks represents the state in this case.

***State of Alaska v. EEOC/Ward.*** The state received an adverse decision from an en banc panel of the Ninth Circuit Court of Appeals in this case on May 1. The case involves allegations of sex and race discrimination and retaliation by Margaret Ward and Lydia Jones, two former employees of the Office of the Governor in the Hickel administration.

The claims were filed with the Equal Employment Opportunity Commission (EEOC) under the Government Employees Rights Act ("GERA"). The EEOC and Ms. Ward sought en banc review and raised for the first time a 2006 case, *United States v. Georgia*, in which the United States Supreme Court held that, when a plaintiff in a Title II ADA case alleges an actual constitutional violation, Title II abrogates sovereign immunity. Under the *Georgia* analysis, when there is an alleged constitutional violation, the "congruent and proportional" analysis is bypassed. The state

argued that the holding in *Georgia* should not be extended to other statutes, including GERA. The majority of the en banc panel found that Congress's intent to abrogate was unequivocal and that all of the claims brought by Ms. Ward and Ms. Jones, if true, would be actual constitutional violations. Therefore, the court held that sovereign immunity does not bar the claims. AAG Brenda Page represented the state in this litigation.

**Parson v. AHFC.** On May 14, AAG Jessica Srader participated in oral argument on a motion for summary judgment in this case. Parson alleges violations of AS 18.80.220, claiming he was subjected to a hostile work environment and that his termination was motivated by racial discrimination. AHFC (Alaska Housing Finance Corporation) moved for summary judgment arguing Parson failed to establish a *prima facie* case of discriminatory termination and failed to allege facts sufficient to constitute a hostile work environment. If the motion is denied, the case will go to trial on September 21. AAGs Jessica Srader and Mags Paton-Walsh represent the AHFC in this case.

### **Workers' Compensation**

The Lawsons, d/b/a JB Services, were investigated by the Division of Workers' Compensation for a failure to maintain workers' compensation insurance under AS 23.30.080. After a hearing by the board, the Lawsons were penalized approximately \$91,000 for such failure. They appealed the order to the Alaska Workers' Compensation Appeals Commission approximately 2 weeks after the deadline to file an appeal had passed, without providing a reason for the late-filed appeal.

The Appeals Commission heard oral argument on the late filing and found that the Lawsons had not demonstrated good cause for their delay and denied their late-filed appeal. The case has been referred back to the division to start the collections process. AAG Erin Pohland represents the state in this case.

### **Local Boundary Commission**

**City of Craig v. LBC.** On May 4, the Local Boundary Commission (LBC) filed its brief in the superior court. This is a case in which the City of Craig and other communities from Prince of Wales Island appealed the LBC's decision to approve a petition to annex territory to the Ketchikan Gateway Borough. The LBC's decision to approve the annexation was made on December 5, 2007, and the annexation was presented to the legislature in January 2008. Because the legislature did not disapprove it by joint resolution during its session per Art. X, Sec. 12 of the Alaska Constitution, the annexation became effective in March 2008. The City of Craig's reply brief is June 22.

The court is also considering the City of Craig's motion asking the court to require the Ketchikan Gateway Borough to put into escrow any federal forest receipts and Payment In Lieu of Taxes (PILT) funds it has received since the annexation became effective that are attributable to the area annexed. Oral argument on that motion is scheduled for June 17. Section Chief Margie Vantor represents the Local Boundary Commission in this appeal.

**Special thanks** to former Section Chief Jan DeYoung for all her hard work and exceptional guidance and advice to the section over the years. She will be greatly missed by all. The section wishes her the very best in retirement.

### **Legislation and Regulations**

During the month of May, the section worked on bill reviews for the Governor's office. Section Chief Deborah Behr attended the American Law Institute's annual meeting in Washington, D.C. from May 18-20, 2009.

The section edited and legally approved for filing the following regulations projects: 1. Board of Fisheries (Fishing District Registration in Bristol Bay Area Salmon Fishery; Sablefish Sport Fishery

- Southeast Alaska Area; Northern Pike Sport Fishery - Susitna River Drainage area; Southeastern Alaska Area Commercial Dungeness Crab Fishery Fishing Season); 2. Southeast Region (taking and use of game; statewide provisions; Southcentral/Southwest Regions: hunting seasons and bag limits; Tier I and II permits; community harvest permits; drawing permits; and statewide provisions); 3. Alaska Commission on Postsecondary Education (Alaska supplemental education loan credit criteria); 4. Department of Health and Social Services (Pioneer's Home monthly rates); 5. Department of Environmental Conservation (air quality emission fees); 6. Department of Commerce, Community, and Economic Development (film production tax credit program; occupational licensing fees for a variety of occupations and professions; Medicare supplement insurance, senior-specific certifications, and collection and use of genetic information; capstone avionics loans and data link systems).

## Natural Resources

***Petticrew v. State, CFEC.*** On May 19 AAG Vanessa Lamantia participated in an oral argument before Judge George in the Sitka Superior Court in this appeal of a Commercial Fisheries Entry Commission (CFEC) decision denying the appellant's claim for skipper participation points for the Northern Southeast Inside (NSEI) sablefish longline fishery and denying his application for an entry permit in the fishery. The state argued that Petticrew does not qualify for any skipper participation points because he did not meet his burden of satisfying the "extraordinary circumstances" provision of CFEC regulations in order to excuse his failure to participate in the NSEI fishery during the qualifying years 1982-1984. The state also argued that the CFEC correctly denied Petticrew's application for an entry permit because he failed to claim sufficient points to avoid a final denial.

## **Polar Bear Endangered Species Act Cases**

The State of Alaska filed its answers this month as a defendant-intervenor in *Center for Biological Diversity, et al. v. Kempthorne, et al.*, and *Defenders of Wildlife v. U.S. Department of the Interior, et al.*, two cases involving the decision listing the polar bear as a threatened species and the special rule issued under the Endangered Species Act Section 4(d). These cases, along with *State of Alaska v. Kempthorne, et al.*, comprise three of the 10 cases now centralized in the United States District Court for the District of Columbia involving the polar bear listing decision and the special 4(d) rule. The Omnibus Appropriations Act of 2009 provided until May 10 for the Secretary of the Interior to withdraw the special rule. However, the special rule will remain part of the litigation following the Secretary's decision on May 8 to retain the rule. The administrative records for the listing decision and the special rule have now both been filed. A second status conference was recently held but a scheduling order for briefing has not been issued. AAG Brad Meyen and outside counsel represent the state in these cases.

## **Temporary Restraining Order Denied in New Humpback Whale Suit**

Plaintiff in a new federal suit sought a temporary restraining order (TRO) against the state for failure to obtain an incidental take permit for humpback whales under the Endangered Species Act prior to implementing a new salmon drift gillnet fishery in a known humpback whale foraging area in Prince William Sound.

The court ordered the state to file a response by noon, May 21; the fishery was to open May 25. Plaintiff did not perfect service on the state until after the state entered a limited appearance informing the court that service had not been perfected and was not waived, and the court did not yet have jurisdiction. The state filed an opposition to the TRO motion, and the court denied the motion based on the lack of service and the speculative nature of the damages.



The court ruled the motion premature and stated that it will consider plaintiff's motion for a preliminary injunction after full briefing on the merits. Senior AAG Lance Nelson and AAG Brad Meyen represent the state.

***Hunz v. State, Department of Natural Resources.***

On May 1 the state filed its answer and counter-claims in this case, a quiet title action in Juneau Superior Court implicating the navigability of the Skagway River. For several years the Hunzes have been occupying and removing gravel from lands they claim to be within their patents to uplands adjacent to the Skagway River. The state claims the lands in question were below the ordinary high water line on the date of Alaska Statehood and are therefore state lands under the Equal Footing Doctrine. Senior AAG John Baker represents the Department of Natural Resources in this case.

***Appeal of State of Alaska (Dinyea Corporation).***

On May 13 the section filed the statement of reasons in this appeal to the Interior Board of Land Appeals from a Bureau of Land Management decision approving certain lands for conveyance to the Dinyea Corporation without reserving periodic site easements along the Dall River. The state believes the easements are necessary to preserve public access under Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA). Senior AAG John Baker represents the state.

***Aleutians East Borough v. Gillis.*** On May 29 the state filed its reply on cross-motions for summary judgment in this case, a declaratory judgment action in Anchorage Superior Court in which the state is a third party defendant. The primary issue on summary judgment is whether AS 38.05.035(f) allows the grant of a preference right to lease or purchase state land to an individual who did not enter the land and begin conducting commercial guiding operations on it until after the state selected it from the federal government.

Oral argument is set for June 26, at which time Judge Suddock will rule from the bench. Senior AAG John Baker represents the state.

## **Oil, Gas, and Mining**

Attorneys in the section are representing the state in a bankruptcy petition filing by Pacific Energy Resources Limited (PERL), which holds state oil and gas leases in the Cook Inlet. On June 3, 2009, the Delaware Bankruptcy Court will hear argument on several motions, including PERL's motion seeking authorization from the court to abandon its interests in the Spurr Platform, which it co-owns with Marathon Oil Company. The platform has not produced oil and gas since 1992 and Marathon has started a decommissioning process removing derricks and plugging wells. The department has worked with all interested state agencies: the Departments of Natural Resources and Environmental Conservation, the Alaska Oil and Gas Conservation Commission, and the Regulatory Commission of Alaska, in an effort to coordinate the state's response to PERL's petition.

AAG Ken Diemer represented the Department of Revenue Tax Division in an intensive administrative hearing before the State Assessment Review Board from May 19-22 concerning the 2009 property tax valuation of the Trans Alaska Pipeline System (TAPS). The Department of Revenue assessed the TAPS at \$7.7 billion, while the North Slope Borough, Fairbanks North Star Borough, and the City of Valdez, argued that the value of the TAPS is in the order of \$12 billion. The TAPS owners argued that the value of the TAPS was no more than \$1 billion. A decision from the State Assessment Review Board is expected by the end of May.

## Opinions, Appeals & Ethics

AAG Judy Bockmon addressed a number of informal ethics inquiries by email and phone this month. She also issued one written advisory opinion and concluded one complaint matter. The section currently has four complaints in various stages of investigation and three other preliminary investigations, two one of which are currently active. There have been six requests for conflict waivers addressed since the last report, and three are pending.

During the month the section continued to help the Governor's office with responses to the many pending public records requests. The section is enormously grateful to AAGs Libby Bakalar, Mike Ford, Karen Ince, Michele Kane, Bob McFarlane, Toby Steinberger, Tim Twomey, Amy Williams, and paralegals Kamie Willis, Paula Wright, and Lori Yares for offering their assistance.

### **Appeals**

***Roland L. v. State, OCS, S-13295.*** The Alaska Supreme Court issued an opinion affirming the trial court's decision to terminate the father's parental rights in this case governed by the Indian Child Welfare Act (ICWA). The father (Roland) had challenged the trial court's finding that active efforts had been made to provide remedial services designed to prevent the break up of the Indian family. For the first couple months of the case, while the father was incarcerated, the Office of Children's Services (OCS) conceded that it did not make active efforts to provide services to him. But that failure was overshadowed by Roland's subsequent conduct. While it was still early in the child-in-need-of-aid (CINA) case, the father chose not to cooperate with OCS, failing to participate in the development of a case plan, failing to show up for scheduled visits with his child, and absconding for approximately ten months to avoid arrest for a probation violation he had committed.

Only after he was jailed again did he become willing to work a case plan. By then his daughter was a year-and-a-half-old and a stranger to him. The trial court delayed the termination proceeding for six months to pursue active efforts.

Though Roland did make some progress during that time, he did not take full advantage of the opportunity he was given, including calling off visitations just when he had the chance to try to establish a bond with his daughter. In its decision, the court rejected Roland's argument that OCS' active efforts had been too little too late and agreed with the trial court that it was Roland who had missed his chance. Considering the entirety of the case and the totality of the circumstances, the court affirmed that the trial court did not err in finding that OCS made active efforts to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that those efforts were unsuccessful. AAG Vennie Nemecek represented the Office of Children's Services at trial, and AAG Laura Bottger handled the appeal.

***Claudio G. v. OCS, S-13304.*** The Alaska Supreme Court decided a termination of parental rights/Indian Child Welfare Act (ICWA) case. In an unpublished memorandum opinion and judgment (MOJ), the Supreme Court affirmed the trial court's termination of a father's parental rights to his two children based on the father's unremedied mental health issues. The court rejected the father's arguments that the state had not met its burden of proving that (1) the children were endangered by the father's mental illness or deficiency and (2) he had not remedied the endangering conduct or conditions. The court also rejected his argument that (3) the trial court's finding that returning the children to him was likely to result in serious damage to the children was not supported by sufficient expert testimony to meet the standard mandated by ICWA.

The court rejected argument (1) because mental health experts credibly testified that the father had anger management issues, communication problems, narcissistic personality disorder, and intelligence commensurate with borderline mental retardation, and it was reasonable to conclude that his anger management problem would re-manifest itself in a parenting situation, given his refusal of further counseling, his history of only intermittent counseling in the past, his history of domestic violence, and anger management problems he had shown in dealing with his social workers. The court rejected argument (2) because credible evidence was presented that the father had not addressed his anger management or impulsivity issues, as demonstrated by angry, profane e-mails he sent to OCS, his threats to "get crazy" during visits with social workers, confrontational incidents he instigated at the visitation center, and his refusal to take medication prescribed for mental health issues.

The court rejected argument (3) because (a) the expert's testimony referenced the father's mental health diagnoses with particularity and explained how these would likely inhibit his ability to parent, and (b) the expert's testimony was supplemented by other evidence supporting the likelihood of harm to the children should they be returned to Claudio's custody.

AAG Steven Bookman represented OCS at trial, and AAG Mike Hotchkin briefed the appeal.

**C.K. v. State/J.H. v. State, S-13344.** AAG Megan Webb filed an appellee's brief in this consolidated child-in-need-of-aid appeal. A mother challenged the termination of her parental rights to her son and daughter and the father challenged the termination of his parental rights to his daughter. The Office of Children's Services (OCS) assumed custody of the two children based on concerns of neglect, domestic violence, and parental substance abuse.

Over the course of the next several months, OCS placed the children back in the home on

three occasions, hoping to reunite the family, only to remove them a short time later based on the mother's conduct and conditions in the home. The father, who was incarcerated for much of this time, was then released on bail and he and the mother began participating in rehabilitative services. OCS was once again able to place the children in the family home. After only a couple of months, however, the father was remanded into custody and the mother's conduct regressed. As a result, OCS removed the children (who suffered from post-traumatic stress disorder and serious behavioral issues) for the fourth and final time. Despite the on-going identification of rehabilitation services designed to reunify the family, neither parent was able to remedy the conduct or conditions that placed the children at risk of harm. As a result, almost three years after OCS first assumed custody of the children, the trial court terminated the parents' parental rights.

Both parents have appealed that order. The mother argued that the trial court erred in concluding that she failed to timely remedy her conduct and that the children would be at substantial risk of harm if returned to her care. The father argued that the trial court erred in finding that he failed to remedy the conduct that placed his child at substantial risk of harm, that OCS made reasonable efforts to reunify the family, and that it was in the child's best interests for the father's parental rights to be terminated. OCS argued that there was more than sufficient evidence to support each of these findings and that the termination orders should be affirmed. AAG Shanna Johnston was the trial attorney; AAG Megan Webb is handling the appeal.

**S.S. v. State, S-13392.** AAG Megan Webb filed an appellee's brief in this child-in-need-of-aid case in which a mother's parental rights were terminated to her two children after they had been in OCS's custody for three years. OCS first assumed custody of the children in August 2005, after it became concerned about the mother's ability to keep the children safe based

on her use of alcohol and marijuana (which she deemed appropriate), her on-going problems with depression, her unstable living situation, her husband's use of illegal substances, her neglect of the children, and the fact that her fourteen-year-old companion abducted and physically assaulted her two-year-old son. Rather than remain in the Seward area where she could have regular contact with her children and engage in reunification services, the mother moved to Wasilla with her husband. This effectively precluded regular visits and resulted in a substantial delay in the mother engaging in services.

The mother eventually completed substance abuse treatment, but resumed her consumption of alcohol; delayed treatment for her depression for two years and didn't address her diagnosed personality disorder at all; continued to reside with her husband, who remained untreated for substance abuse; and was unable to maintain a safe, stable residence. Moreover, the mother continued to have only very limited contact with the children and lacked a parent-child relationship with them. As a result, the trial court terminated her parental rights to both children.

On appeal, the mother argues that the trial court erred in concluding that she failed to remedy the conduct or conditions that placed her children at risk of harm and in finding it was in the children's best interests to terminate the mother's parental rights. OCS argued that there was more than sufficient evidence to support the trial court's order, which should be affirmed. AAG Shanna Johnston was the trial attorney; AAG Megan Webb is handling the appeal.

***OPA v. Alaska Court System, S-12999.*** AAG Megan Webb participated in oral argument for this appeal in the Alaska Supreme Court. The case involves the question of whether the Office of Public Advocacy (OPA) or the Court System must provide counsel for an indigent mother in a civil child custody case. The trial court determined that the mother had a due process

right to counsel because the father had retained private counsel but lacked the financial resources to pay for the mother's counsel under the fee-shifting scheme contained in the divorce statutes. It then required the Court System to provide counsel for the mother under Administrative Rule 12(e). The trial court also concluded that OPA's enabling act (AS 44.21.410(a)(4)) violated the equal protection clause. The Court System intervened and asked the court to reconsider, either by concluding that the mother did not have a due process right to counsel or because OPA was statutorily required to provide counsel. OPA then intervened and argued that its enabling act was not triggered by the circumstances of this case because under AS 44.21.410(a)(4), it is only required to provide counsel for an indigent parent in a civil custody case if the opposing party is represented by counsel provided by a public agency – which wasn't the case here.

The trial court affirmed its original order and then concluded that, as an alternative basis, the mother had a constitutional right to counsel because a guardian ad litem had been provided for the child by a public agency (OPA) and that OPA's enabling act could be read broadly enough to trigger OPA's obligation to provide counsel to an indigent parent when a GAL is appointed for a child in a civil custody case, rather than simply when "counsel" is provided by a public agency.

The Office of Public Advocacy appealed, asking the Supreme Court to vacate the portions of the trial court's orders addressing equal protection and statutory interpretation and to re-instate the original order requiring the Court System to provide counsel for the mother. OPA did not appeal the trial court's initial determination that the mother had a due process right to counsel.

The Court System raised due process in its appellee's brief; the mother primarily argued about due process in her brief; and three groups of amici (the ABA, a group of retired judges, and several public interest groups) filed briefs focused solely on the trial court's original due process analysis. The Supreme Court granted each side

30 minutes to argue the issues; amici did not participate in argument. Section Chief Joanne Grace was the trial attorney; AAG Megan Webb handled the appeal.

***S.B. v. OCS and L.W. v. OCS, S-13302, 13310.*** AAG Mike Hotchkin filed the state's appellee's brief in consolidated termination of parental rights/Indian Child Welfare Act (ICWA) appeals in state supreme court. Following trial in Kotzebue, the trial court issued a written decision terminating the parents' rights to their children (including a recently born child who was not alive during much of the time OCS was working to reunify the parents with their older children).

The court's written order by design addressed only the issues that the parties had identified at trial as contested and briefed in closing arguments; it did not contain all findings necessary to terminate parental rights under ICWA. Following this initial decision the state submitted a proposed final order containing all of the findings necessary for termination under state law and ICWA. The court signed this order, interlineating that it was "subject to" the earlier order.

The appellants argue that (1) the trial court's final written order is of no force or effect, amounting to merely "a hasty attempt by the state to clean up a legal error by the trial court;" (2) the trial court erred in terminating the parents' rights to the recently born child based in large part on the unsuccessful attempts to reunify the parents with the older children; (3) expert testimony that returning the children to the parents would result in harm to the children was overly general and thus did not satisfy the strict ICWA standard; and (4) even if the trial court did not commit any error sufficient to justify reversal in and of itself, the cumulative effect of the trial court's errors deprived the parents of their due process right to a fair trial. The state disagrees with each of these assertions.

Ordinarily, the Alaska Supreme Court does not hear oral arguments during the summer months, but because this is an expedited child-protection case, the court has calendared a special oral argument for this appeal in early July.

## Regulatory Affairs and Public Advocacy (RAPA)

### Decisions Rendered

**S-127-88 Appeal (RCA U-04-22/23), MOA d/b/a AWWU v. RCA and AG.** On May 8, the Alaska Supreme Court issued Opinion No. 6371 which reversed the superior court's decision upholding the Regulatory Commission of Alaska's (RCA) decision against Anchorage Water and Wastewater Utility's (AWWU) Municipality Utilities Service Assessment (MUSA) based rate increases, and remanded the matter for further proceedings by the RCA. The Supreme Court found that the RCA's ruling lacked a reasonable basis in the record, so the case was remanded for the RCA to make a determination on the merits of the reasonableness of AWWU's proposed rate increase. RAPA successfully argued the case before the RCA and on appeal before the superior court.

On May 18, AWWU moved for clarification by the Supreme Court of the scope of the remand and the law that is to be applied by the RCA on remand. The Attorney General/RAPA filed its limited opposition to that motion on 5/29/09. The Municipality of Anchorage (MOA) d/b/a Anchorage Water and Wastewater Utility (AWWU) appealed the Superior Court decision upholding the RCA decision that AWWU cannot increase its rates to offset payments in lieu of property taxes on contributed utility property that the utility is required to pay the Municipality of Anchorage. At stake is an estimated \$17 million (and counting, plus interest) refund obligation of already implemented rate increases.

**U-08-138, CEA interconnection standards.** On 4/29/09, the Regulatory Commission of Alaska (RCA) issued its final decision in a proceeding initiated by Chugach Electric Association's (CEA) proposed criteria to govern its interconnection with non-utility power generation facilities seeking to sell power to the utility. CEA proposed to unilaterally require formal, federal certification of the non-utility's Qualifying Facility (QF) status, as opposed to self-certification by the non-utility, *before* it is required to negotiate a power purchase agreement with the QF under applicable state regulations.

The parties filed statements of position on the proposal, with the Attorney General/RAPA stating that, given federal/FERC regulations, the RCA has limited jurisdiction to rule on certain aspects of the dispute, but that CEA should not be allowed to arbitrarily compel a self-certified QF to incur the significant costs of formal certification.

In Order No. 3 (issued on the pleadings without hearing), the RCA determined that it had sufficient state authority to instructively 'referee' disputes over whether a project is a QF in a non-binding manner for the purpose of FERC requirements.

Therefore, the RCA required CEA to modify its tariff accordingly: a) not to require formal FERC certification before CEA follow the procedures of its tariff; and b) to allow either CEA or the owner of a potential QF project the option of requesting that the RCA determine whether CEA must treat the project as a QF absent formal certification. Under the decision, the party dissatisfied with an RCA determination would retain the ability to seek formal FERC certification or to challenge self-certification, as applicable.

#### **Direct Testimonies Filed**

**U-08-124/125/126/127, APES refuse cases.** On September 16, 2008, Alaska Pacific Environmental Services (APES) LLC filed tariff

revisions with the Regulatory Commission of Alaska (RCA) seeking to permanently increase rates for refuse collection services in its four service areas, respectively, as follows: Ketchikan, +4 percent; Dutch Harbor, +20 percent; Nome, +19 percent;; and Juneau, 5 percent. The Attorney General/RAPA filed comments on October 24, 2008 that recommended suspension for further investigation, and filed a notice of election to participate in the docket on November 5, 2008.

After preliminary investigation and discovery, RAPA pre-filed the responsive, direct testimony of its staff expert, Janet Fairchild, on May 15. Her analysis identified various recommended adjustments to the utility's proposed revenue requirements that would: eliminate the proposed rate increase in Ketchikan; reduce the proposed rate increases in Dutch Harbor, Nome and Juneau, respectively, and require refunds in all service areas but Nome of the interim/refundable rate increases previously granted in excess of the RAPA-proposed rate increase reductions.

The utility's reply testimony is due June 6. An evidentiary hearing is scheduled to begin on August 17.

**U-08-139, GVEA rate case.** On September 30, 2008, Golden Valley Electric Association (GVEA) filed a required revenue requirement, and cost of service and rate design studies that the utility purported would support a 7 percent increase in residential electric rates, and a 6 percent rate increase for large and small general service rates in its Fairbanks service area. The utility proposed, however, only a 3.4 percent overall rate increase. The Attorney General/RAPA filed a notice of election to participate in the docket on December 5, 2008.

On May 18, after preliminary investigation and discovery, RAPA pre-filed the responsive, direct testimony of staff expert Parker Nation, Jr. His analysis concluded that, after limited adjustments, GVEA's revenue requirement would support an overall rate increase of 2 percent; and further,

that the utility should be required to re-run its cost of service study and rate redesign using the RAPA-recommended revenue requirement adjustments. GVEA's reply testimony is due July 2 and an evidentiary hearing is scheduled for August 10.

#### **New Case**

**U-09-34, Eagle water rate case.** On February 23, 2009, Eagle Utilities, Inc. (Eagle) filed a request for a 22 percent across the board increase to its recurring charge for water services provided to 255 customers in its Palmer service area. This is a standard rate case for a small utility, except for the utility's proposed hypothetical capital structure and affiliated interest transactions. The Attorney General/RAPA filed a notice of election to participate in the docket on May 5. A procedural schedule has not yet been set.

### **Torts and Workers' Compensation**

#### **Verdict Announced in Trial of Last LeConte Passenger Injury Case**

On May 10, 2004, the M/V LeConte grounded in Peril Strait; the passengers were evacuated and transported on other vessels to their destination, Sitka. Almost three years later a group of over 30 passengers filed a personal injury suit in admiralty in superior court, primarily stemming from the way one of the lifeboats was lowered. All but one of the plaintiffs' claims was resolved without trial. In February 2009 a bench trial took place before Superior Court Judge David George on the claims of the remaining plaintiff, Doris Hunter.

The state admitted negligence in the grounding and in failing to better warn the passengers of what could happen during the lifeboat lowering, so the trial focused on causation, damages caused by the state's negligence, and whether the captain and chief mate (who were named

as defendants) could be liable for punitive damages.

Judge George recently announced his verdict, finding that most of the plaintiff's physical and medical complaints after the grounding mirrored her pre-existing condition and were not caused by the grounding or the lifeboat lowering. The judge awarded under \$1,000 for medical bills that the state had not paid, and found no other economic losses (no lost wages, past or future). The judge awarded non-economic damages for a period of about 2 ½ months after the accident, on the grounds that any temporary aggravation of pre-existing problems should have resolved within that time; the amounts were \$2,500 for inconvenience and emotional distress, and \$7,500 for pain and suffering and loss of enjoyment of life. There were no future non-economic damages, so the total verdict is under \$11,000.

The court also evaluated claims for punitive damages under three different legal tests (intentional or willful misconduct, recklessness, gross negligence) and found that punitive damages were not warranted.

The state has submitted proposed findings of fact and conclusions of law, as well as a final judgment. Once the judgment is signed, a motion for award of attorney's fees will be filed.

This case was primarily defended by the private firm of Nicoll, Black & Feig, which was retained by the underwriters of the state's insurance for this type of loss. AAG Susan Cox assisted as local counsel throughout the case and trial. This is the last passenger injury claim related to the LeConte grounding.

## CRIMINAL DIVISION

### Anchorage DAO

Anchorage and Dillingham conducted 11 trials and 83 grand juries during the month.

In one of the more interesting grand juries this month, ADA Joan Wilson presented a witness tampering charge against a man who had committed serious animal cruelty. The defendant, charged with that misdemeanor, then proceeded to cajole, entice and otherwise encourage the eye and ear witness to the crime to retract his original statements to police. Both men are members of a motorcycle club, but the cooperating witness explained that the animal cruelty bothered him so much that he had to report and testify against his friend.

ADA Clint Campion prosecuted a 1999 sexual abuse of a minor in the first degree case that required the testimony of the two victims, now 21 and 31, about the abuse they suffered at the hands of 51-year-old Sean Wright when they were, at different times, 9-years-old and living in the same household with Wright. Wright had married the young girl's mothers while their lives were in shambles and had abused the young daughters over a period of years. The two victims had never met each other but told eerily similar details about the abuse suffered. Three additional victims will be presented at sentencing. The victimization spans 30 years.

ADA Brittany Dunlop prosecuted 21-year-old Romeo Iyapana for sexually and physically assaulting the 60-year-old boyfriend of his grandmother. Since the physical beating was impossible to dispute, the defense argued that the old man was beaten and simply made up the sexual component to get the defendant in more trouble. The jury disagreed.

ADA John Skidmore retried Randy McDaniel for the gang-related shooting of the driver in a rival's car. In all, 38 shell casings were

recovered from the scene where the two rivals shot from cars. McDaniel argued anticipatory self-defense based on the bad blood between the rivals. After deliberating for three hours, the jury returned a guilty verdict.

ADA Paul Miovas tried Patrick Torrence for the domestic violence rape of his estranged wife. The jury found Torrence guilty on several counts even without hearing evidence regarding his domestic violence history that the state sought to introduce but the court excluded on Evidence Rule 403 grounds.

ADA Gustaf Olsen tried a constitutionalist named Lehman Olson for domestic violence assault. Because of the same last name issue, the defendant insisted on being addressed only as "the accused". The accused was convicted of assault three and tampering with a witness for the 93 recorded contacts that he had with his wife from the jail. He counseled her on innumerable ways in which she might assist him. ADA Gustaf was able to condense the 10 hours of jail recordings into 52 minutes.

In a sentencing of note, Judge Phillip Volland sentenced Ronald Christian to 107 years for the torture and murder of Christopher Lindstrom. Prosecutor Sharon Marshall argued that Christian and a co-defendant took Lindstrom's ATM card, tortured him until he disclosed the PIN for the card, then dumped his body into an outhouse toilet. The judge found the crime among the most depraved that he had ever seen.

### Fairbanks DAO

About a year ago the offices reported on the conviction of a defendant convicted of executing his "friend" by shooting him in the back of the head in an attempt to curry favor with a mutual drug dealer. This defendant then dismembered the victim's body and put most of the pieces into the local river to be disbursed by the currents. The head, however, was kept so that he could pull out the teeth so that the victim could not



later be identified by his dental records. The defendant also kept a severed arm tattoo in hopes of a reward from the victim and defendant's mutual drug dealer.

The defendant was convicted of murder in the second degree and misconduct involving weapons. At sentencing the trial judge was mindful of the defendant's history of felony convictions committed as a juvenile, and that he had received numerous prison disciplinary reports while incarcerated pending trial on the murder charge, including one involving an assault against another inmate. The trial judge also found his conduct amounted to premeditated murder in the first degree, finding him a worst offender and sentenced him to a composite term of 82 years to serve.

On appeal the defendant argued that his sentence was unduly harsh as sentences in the 80 year range should be reserved for cases involving "gratuitous and unexplainable acts of extreme violence". He executed his victim by shooting him in the back of the head at close range to keep him from ratting out their mutual drug dealer. He then dismembered his body to destroy as much evidence as possible. He kept the head for the purpose of later pulling out the victim's teeth to make identification by dental records impossible. He argued that his sentence couldn't be upheld because it didn't involve acts of gratuitous and unexplained acts of extreme violence. The Court of Appeals disagreed and upheld the sentence.

A now 21-year-old defendant was convicted of criminally negligent homicide and driving under the influence following a two week trial. This then 20-year-old defendant ran into a 5-year-old child driving his "big wheel" tricycle on the street in front of his home. Immediately prior to the accident this defendant had been partying with her friends by drinking rum straight from the bottle at a park near the victim's home. The defendant drove because she believed herself to be the least intoxicated of the three parties.

As she rounded the corner and found herself driving into a late winter evening sun-field, she failed to slow down or see the boy and ran into him while traveling in the same direction. Although the victim lived for some months following the accident, he died in a Seattle hospital just as it looked like he was turning the corner and would fully recover. The jury acquitted the defendant of manslaughter but found her guilty of criminally negligent homicide. Sentencing has been set for October.

May was a busy month in Fairbanks with 7 other trials and 48 cases presented to the grand jury.

### **Small Team Wins Big**

In the first annual Fairbanks DAO wiffle ball tournament the team led by summer intern Landon Small (the Small Team) soundly defeated the team lead by summer intern Javier Diaz. After the Small Team scored 10 runs in the top half of the first inning before registering an out, the Diaz Team amended the rules to say that you could only score 10 runs in one inning.

When DA Mike Gray then struck out two of the three Diaz Team batters in the bottom half of the inning, and held them to no runs scored, the Diaz Team ruled that each team had to rotate pitchers every inning and that the same pitcher could not pitch twice before every team member had pitched an inning.

In spite of all the rules changes demanded by the Team Diaz, talent prevailed and the Small Team won the event 34-15. Team Diaz did, however, provide the play of the day when pitcher Javier Diaz made a spectacular sliding-into-the-woods catch of a foul ball along the first base line. Said winning team member ADA Andrew Baldock, "we hit well, ran the bases well, pitched well, and played good defense - it was a team effort".

## Kodiak DAO

Kodiak finally broke free of winter with about two weeks of uninterrupted sunshine. Magistrate Dawson Williams, formerly of Unalaska, started his new job as the Kodiak magistrate. On May 22, Steve Cole was formally sworn in as Kodiak's newest Superior Court judge. The ceremony was well attended and included former Superior Court Judges Roy Madsen and Joel Bolger, and former Kodiak magistrate Anna Moran (now of the Kenai Superior Court).

During May, the Kodiak grand jury indicted a long time Kodiak resident charging him with three counts of assault in the third degree. Troopers responded to a 911 report of shots fired. Investigation revealed the defendant (clad in his bathrobe) approached neighbors running a chainsaw after 10 p.m. The man uttered some epithets questioning the general intelligence and paternity of the group before producing an automatic pistol, running the action, and firing it toward the group. The shot struck the ground. The defendant then left the group reportedly saying he was going to go get a bigger gun.

In an unrelated incident, a man was charged with felony assault after his girlfriend's mother brought her to the emergency room where she was examined and found to have injuries consistent with her report of having been beaten and strangled.

A Kodiak man was indicted for eluding troopers on a four-wheeler. The man was out driving at excessive speeds in a residential area. He raced away when spotted by troopers and drove into a driveway. He attempted to get the homeowners, who were having their own gathering, to assist him in hiding the bike with a tarp. The homeowners were not so inclined as the man had nearly run over some small children in the driveway when he sped in. Troopers arrived moments later.

The Kodiak Crab Festival took place during the Memorial Day weekend and was accompanied by

the usual spate of rain. The skies cleared and the sun came out as soon as the carnival was being packed up. ADA Shannon Eddy participated in the Pillar Mountain run. The foot race requires participants to run up and down Pillar Mountain while traversing a 9.2 mile course.

## Palmer DAO

On May 22, John Shook and Michael Hamilton were each convicted by jury of three counts of misconduct involving a controlled substance in the fourth degree. The case stemmed from a search warrant execution in 2006 during which investigators recovered 48 marijuana plants in various stages of growth. The defendants argued that under Alaska law they were permitted to possess 24 plants each. However, there was no evidence the defendants were maintaining separate grows, and the jury found them guilty under the theory of accomplice liability. Despite a total dry marijuana weight of over seven pounds, the jury found the defendants not guilty of manufacturing marijuana with the intent to deliver, as there were no scales, cash, baggies or other evidence of ongoing marijuana sales. The trial prosecutor was ADA Kerry Corliss.

A jury convicted Donald Wiggins of four counts of misconduct involving a controlled substance in the second degree, misconduct involving a controlled substance in the fourth degree, and tampering with physical evidence for participating in a meth lab set up in a unit of an occupied apartment building. Wiggins and his codefendants were caught with an active meth lab after a Fred Meyer Loss Prevention Officer reported Wiggins and his friends showing an unusual amount of interest in tincture of iodine and Coleman fuel. Investigators responded to the call, followed them to the apartment building, were able to see through a window a lab being set up, secured a search warrant, and then entered the apartment as the four suspects were just sitting down to consume the fruits of their labors. Wiggins was the second of the four co-defendants to go to trial and be convicted. ADA Alison Collins prosecuted this case.

Charles Conrad was convicted by a jury for forgery in the second degree, theft in the second degree, and theft in the third degree for stealing his mother's check. Conrad testified that the reason he stole the check was to help his best friend who was about to be evicted and to help pay for food for his friend. Conrad claimed his friend was eating tortilla chips and peanut butter for breakfast. Over the state's objection, Judge Cutler gave a necessity defense instruction to the jury. The jury was not swayed by Conrad's testimony and convicted him of all charges. ADA Trina Sears was the trial prosecutor.

Tariek Oviuk was sentenced to 35 years with 20 years suspended on a guilty plea to attempted murder in the first degree. In 2005, a jury convicted Oviuk of attempted murder and assault in the second degree for his attack on his long time girlfriend and mother of his two children. Oviuk attacked the victim when she drove into the garage. He locked the two of them in the garage, cut her with a box cutter and hit her in the head with a baseball bat. The victim was only saved because she had her mother's cell phone in her pocket and was able to call 911. Oviuk had a history of abuse to the victim. Oviuk was convicted and sentenced to 20 years to serve. Oviuk appealed his conviction which was overturned on a failure of the trial judge to allow him to represent himself. On remand, Oviuk pled to the attempted murder charge and agreed to 15 years to serve with the remainder of the sentence open to the court. The court found that his crimes were terrifying and that, though he had taken steps to understand his past, that he was a danger to the victim and any future girlfriends. ADA Suzanne Powell was the trial attorney, and ADA Rachel Gernat handled the remand.

Jason Christenson was indicted for sexual abuse of a minor in the second degree. Christenson abused a 4-year-old boy at a construction site where Christenson was working and the boy was visiting his relatives. The boy immediately told his mother who reported it to law enforcement.

Christenson is believed to be out of state and there is an outstanding warrant for his arrest. ADA Rachel Gernat handled this case.

Robert Bradley was indicted on two counts of sexual abuse of a minor in the second degree, one count of sexual abuse of a minor in the third degree and online enticement of a minor. Bradley met the 13-year-old victim on a social website. After chatting on-line, Bradley drove out from Anchorage and picked up the 13-year-old. He was caught in the car with her when a neighbor called in a suspicious vehicle. Bradley admitted to the sexual acts performed in the car and admitted to knowing the victim was 13-years-old. ADA Rachel Gernat handled this case.

A jury convicted Richard Pocock of multiple counts of misconduct involving a controlled substance in the second degree and misconduct involving a controlled substance in the fourth degree for his sale of heroin to a confidential informant. Pocock sold heroin to the confidential informant three times over a one week period; twice in the Wasilla Carr's parking lot and once in the Wasilla Fred Meyer's parking lot. This was the second felony conviction for Pocock. The trial prosecutor was Paul Roetman. As a side note, this was ADA Roetman's seventh trial since returning to the Palmer Office in December.

On May 21, a Palmer grand jury indicted Christopher Burleson for attempted murder, burglary one, and three counts of assault one and Lawrence Walker for burglary one and hindering prosecution one for their involvement in an April 2008 shooting in Houston, Alaska.

The victim described two men, one older and taller, one shorter and younger knocking on his door and asking about a television he had for sale. After turning to show them the television, the younger and shorter man, later identified as Christopher Burleson, pulled out a shiny revolver, and shot the victim in the chest. The two men then fled in a vehicle that was described as a black extra-cab truck with custom black rims.

Following a lengthy investigation, Burleson was identified as the shooter, and Walker identified as the accomplice and owner of the black extra-cab truck. Several months after being identified, Walker told police he wanted to cooperate and admitted his participation in the burglary and hindering prosecution stating that he and Burleson were going over to the victim's house to "rough him up" in retaliation for a home invasion burglary involving a marijuana grow operation that Walker believed the victim was involved in. Walker also explained that he was unaware of Burleson possessing a gun, but identified Burleson as the shooter. A \$250,000 cash arrest warrant is outstanding for Burleson. ADA Paul Roetman prosecuted the case.

Jesse Bishop was sentenced on one count of misconduct involving a controlled substance in the second degree for his involvement in the sale of a very small amount of heroin (1/10 gram) with two of his brothers. Jesse Bishop had a prior conviction for misconduct involving a controlled substance in the second degree (meth production). At sentencing, Bishop's attorney requested that the court refer the case to a three-judge panel for sentencing. In the alternative the defense requested that the sentence be mitigated to the maximum extent possible (five years to serve). After a two and one-half hour hearing involving a defense expert, Psychologist Dr. Glass, Judge Cutler denied the request for a three-judge panel and sentenced Jesse Bishop to eight years flat – the state's requested sentence. The prosecutor was ADA Rick Allen.

Cordova resident, Stuart Boyles Jr., was sentenced on a felony furnishing alcohol to a minor. The minor was the girlfriend of the defendant who had just finished alcohol treatment. ADA Shawn Traini prosecuted the case.

After lengthy motion work on the constitutionality of requiring trucks to have bumpers, Ralph Lewis pled to driving while license revoked. At sentencing, the defendant was sentenced to 75

days and immediately remanded despite his plea for electronic monitoring. ADA Shawn Traini was the prosecutor.

Valdez resident Matthew Kinney was convicted at trial of assault in the third degree and sentenced to 18 months suspended with 10 days of shock jail time, anger management, mental health counseling, 200 hours community work service and loss of his license. Kinney was driving in his subdivision when he saw one of his neighbors. He had some problems with this neighbor and he swerved his car, forcing the neighbor to jump out of the way to avoid being hit. At trial, Kinney had conflicting stories as to what occurred. Kinney was convicted in less than 30 minutes. ADA Mike Perry was the trial prosecutor.

Prosecutor Mike Perry is defending the conviction of Keith Thomas. Thomas was convicted at a bench trial for using a resident hunting and fishing license despite having a residence in Michigan for over a decade. Thomas believes that his minimal ties to Alaska allow him to hunt and fish as a resident. The trial court disagreed and the case is now on appeal. ADA Rachel Gernat conducted training for local medical providers on testifying at trial.

## **Office of Special Prosecutions and Appeals (OSPA)**

### **Appellate Unit**

The bulk of the Appeals Unit's work is defending the state in appeals brought by defendants, but the month of May saw an important victory in an appeal brought by the state before the Alaska Supreme Court.

The Alaska Supreme Court held that a police officer had reasonable suspicion to stop a car pulling away from a bar in *State v. Michael Miller*. The defendant had not been seen doing any impaired driving; the officer's only information was that a male-and-female couple had been

verbally arguing (with arm waving) outside the car before getting into it. The couple's fighting had prompted a concerned citizen to call 911, which then led to the officer's action. The Alaska Supreme Court held that in the circumstances the risk of a domestic-violence assault was great enough to justify the officer stopping the car to investigate the 911 report. The Court's decision adopted much of the reasoning of AAG Tamara de Lucia's briefing and reversed the contrary Alaska Court of Appeals' decision. Among other things, the Supreme Court said the Alaska Court of Appeals had failed to give adequate deference to the trial court's factual findings, which supported the officer's action.

### **Special Prosecutions Unit**

AAG Robin Koutchak, who prosecutes alcohol interdiction (bootlegging) cases, reports that Richard W. Mashburn, age 52 of Selawik, was sentenced, on April 29 by Judge Erlich in Kotzebue, to serve 18 months in jail with 12 months suspended for manufacturing alcohol. Mashburn must pay a mandatory minimum fine of \$10,000 and will be on felony probation for three years.

Selawik, a village near Kotzebue with a population 819, voted in 1986 to ban the sale and distribution of alcohol. Acting on complaints by Selawik residents, Alaska State Troopers ABADE unit (Alaska Bureau of Alcohol and Drug Enforcement) from both Kotzebue and Nome, secured a search warrant in November, 2008 and served it on Mashburn. The search uncovered almost 20 pounds of homebrew along with 365 pounds of sugar, 20 pounds of yeast and 19 cans of fruit juice. The homebrew was being sold in plastic bags for \$50 per gallon. Mashburn, originally from Tennessee, has lived in Selawik since 1983 where he was a Village Public Safety Officer (VPSO) from 1985 through 2007. He was once named VPSO of the year.

AAG Koutchak reports she will be attending the Regional Wellness Forum in Nome on May 27<sup>th</sup>.

This forum meets quarterly and its mission is to address efforts to reduce alcohol and drug abuse and to promote mental and physical wellness. This forum is hosted by Kawerak, Inc. and the Norton Sound Health Corporation. AAG Koutchak will give a presentation on recent amendments to the state alcohol laws. Among other things, these amendments impose substantial mandatory penalties on those who bring alcohol into a dry community.

According to AAG Dan Cheyette, a prosecutor with the Special Prosecution Unit, Juneau District Court Judge Keith Levy recently sentenced American West Steamboat Company, LLC for violating a state criminal law that makes polluting state waters illegal. The charge arose out of the May 2007 grounding of the *Empress of the North*. Judge Levy ordered the company to pay a \$200,000 fine and serve eighteen months of probation on the condition that it not violate any more laws, including any environmental laws and regulations, and abide by its Safety Management System and Fleet Instructions. Judge Levy suspended \$150,000 of the fine. The remaining \$50,000 will be deposited into the state's General Fund and credited to the Oil and Hazardous Substance Release Prevention and Mitigation Account. The legislature created the Mitigation Account to provide funds to investigate, contain, and clean up spills of oil and other hazardous substances and to protect human health and the environment.

### **Rural Prosecution Unit**

The unit worked throughout rural Alaska during this period. Attorneys assisted in Bethel for about six weeks and Kotzebue one week.

In Bethel, in addition to providing day to day assistance, the unit was busy with trials. AAG Dwayne McConnell prosecuted the trial of John Leopold, who was convicted of sexual assault in the first degree, sexual assault in the second degree, and incest. His minimum sentence given his prior record is 40-60 years with aggravators. AAG Olson represented the state

in the trial of Brandon Russell-Durant, who was found guilty of perjury, sexual assault in the second degree, and two counts of furnishing liquor to a minor.

Jonathan Kashatok was sentenced in Bethel on his conviction for murder in the second degree. The homicide was a domestic violence incident in which his girlfriend died after an extremely brutal beating in a van the couple was living in. Kashatok's sentence was 55 years with 20 suspended. Other felony assault sentencings also occurred in Bethel during this time.

In Kotzebue, Elijah Rock III received 55 years to serve on two counts of sexual assault in the first degree following a trial held earlier in the year. He received an additional two years suspended but given his age, he must survive until he is about 95 to be put on probation.

Both AAG Gregg Olson and AAG June Stein traveled to Sitka. AAG Olson participated in Alaska State Trooper Academy training of new recruits. AAG Stein went to Sitka for a change of plea hearing in which Jason Abbott pled guilty but mentally ill to two consolidated counts of murder in the second degree for the murder of four individuals: his grandparents; his aunt and her fiancé. He also pled to assault in the first degree on a surviving aunt. Sentencing is set for September.

## SAVE THE DATE

NAAG Summer Meeting, Colorado Springs, Colorado  
June 16-18, 2009

CWAG Annual Meeting, Sun Valley, Idaho  
August 2-5, 2009